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The Legislative Veto and the Reorganization Act of 1939

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TO students of political science and public administration, a nice balance between legislature and executive has seemed a philosopher's stone for which they should search. In actual practice, a lack of balance between the two powers has not infrequently been a stumbling block in the way of legislative and administrative efficiency. That the two instruments of government should not and do not operate in separate and distinct fields of competence has long been obvious.

In part the problem has been to provide means for the necessary cooperation of legislature and executive in dealing with modern conditions while preventing that collusion which may be dangerous to men's liberties. In part it has been a search for devices which would enable each branch on occasion to speak decisively—thus congressional control of the purse and the executive veto.¹ Recently, as the complexity of

problems and the drain on legislative time have increased, a new device has been invented: a mandate to the executive to act, and, if the result is not liked, a *legislative veto*. It is this we propose to discuss with particular reference to the Reorganization Act of 1939.

When they drafted the Constitution, the "founding fathers" were more concerned to preserve "liberty" than to insure positive, dynamic government. Practice, the force of different personalities, and the circumstances of changing times have given concrete meaning to the tenuous relationships between legislature and executive provided in the Constitution. Few, however, would maintain that the relationships at any time have been altogether satisfactory. Nor have

¹Parenthetically we may note a recent attempt by Congress to limit the President's veto power. In 1940 Congress passed an act (H.R. 3233) repealing certain measures which had been pocket-vetoed by the President. The act provided that all measures pocket-vetoed after the adjournment of a session which was not the final session of Congress should be considered of no effect. Representative Hatton Sumners, chairman of the House Committee on the Judiciary, advocated this law upon the ground that a recent case of the Supreme Court, *Wright v. United States*, 302 U.S. 583 (1937), which held that the President could return a bill to the house of its origin during a recess by delivery to the secretary of the house, cast doubt upon the validity of pocket vetoes after the adjournment of what was not a final session of a Congress.

Representative Sumners had long argued that the constitutional provision about return of bills to Con-

gress by the President, unless prevented by adjournment, referred only to the final adjournment of a Congress. As *amicus curiae* he had urged this point of view upon the Supreme Court in the Pocket Veto Case of 1929, but the Court had construed the Constitution otherwise (279 U.S. 655). The President referred to this as answering the argument when returning H.R. 3233 without his approval. The President further pointed out that under the twentieth amendment it was impossible to foretell whether adjournment of the regular second session in the summer of even numbered years was the final adjournment of a Congress. The measure was regarded as an effort to limit the pocket veto power of the President which had been exercised for many years and even specifically upheld by the Supreme Court.

On the other hand, the President may sign bills within ten days after an adjournment of any session of Congress, in which instance the measure becomes law. See Lindsay Rogers, "The Power of the President to Sign Bills after Congress has Adjourned," 30 *Yale Law Journal* 1 (1920); and *Edwards v. United States*, 286 U.S. 482 (1932).

they been entirely satisfactory elsewhere. In Great Britain, for example, the balance between legislature and executive was long thought to be out of equilibrium because of the control which a Conservative cabinet could exert over its supporters in the House of Commons: a party machine pulled strings which made private member puppets go through the expected motions. Of recent years public opinion and the press have had more influence on cabinets and have changed them more frequently than has independent action by the House of Commons.

In times of national emergency the American Congress has shown itself competent to take quick action—usually by conferring broad powers of sublegislation upon the executive. In less acute situations Congress has seemed to delight in imposing restrictions upon executive discretion and in interfering with the conduct of administrative services.

What has been little appreciated and commented upon is the fact that divergent sectional, economic, and political (not to mention personal) interests manifest among the numerous members of a legislative body frequently make agreement a lowest rather than a highest common denominator. Moreover, legislatures inherently encounter difficulties when they endeavor to act upon complicated and controversial questions. Thus Congress decides that the rates charged by various carriers of interstate commerce shall be "reasonable" and that "unfair" methods of competition in interstate commerce shall be illegal, but more detailed definition under these broad declarations of policy must be left to administrative agencies. In the history of the enactment of tariff legislation we have a vivid indication of what happens when Congress tries to determine the details of a broad and complex subject.¹ Congress indeed has admitted its inability to handle tariff issues satisfactorily, first by giving the President under the acts

of 1922 and 1930 power to adjust rates under certain circumstances, and then more recently by authorizing the President to conclude reciprocal trade agreements modifying existing duties. Logrolling in legislative action has likewise been almost scandalously evidenced in the passage of river and harbor improvement bills.

The legislative practice of delegating broad powers to administrative bodies has been defended on a number of grounds—that it saves the time of legislatures, avoids the possible embarrassment of voting on details, utilizes the expert knowledge of administrators, and provides a better means for flexible adjustment to different circumstances than do detailed laws.² Some of our state and local legislatures have resorted to a modification of the practice of delegation by "incorporating by reference" into their own laws the standards of grain inspection or airport licensing, for example, determined by federal administrative agencies.

Legislative delegation has become so common a device and has been utilized so widely in recent years as legislatures have been called upon to meet ever more complex situations that now it is said we confront a "new despotism." "No further delegation to the executive" has become a popular rallying cry in a time when dictatorship is said to be a real possibility. It does not matter that the slogan, like all slogans, is oversimplified and has little meaning. On one occasion already in our legislative history, when the reorganization bill of 1938 was recommitted, that slogan's power to defeat much-needed reform has been demonstrated.

But out of that defeat came, with respect to this subject of legislation, a new relationship between legislature and executive under the American system of government. An innovation with possibly far-reaching implications may have taken place. For one subject upon which executive and legisla-

¹See E. E. Schattschneider, *Politics, Pressures, and the Tariff* (Prentice-Hall, 1935).

²Cf. Frederick F. Blachly and Miriam E. Oatman, *Administrative Legislation and Adjudication* (The Brookings Institution, 1934).

ture must agree—the organization of the administrative branch of the government—a new balance has been struck. The *legislative veto* of acts of the executive has pointed to an answer to the dilemma between the demand for no further delegation of unlimited power and the need for legislative action upon matters whose controversial details threaten to prevent any action at all.

The Reorganization Act of April 3, 1939, provided that the President might within limits reorganize administrative agencies if either the House or Senate approved, or, to put it more accurately, refrained from objecting. In other words, Congress, which in ordinary circumstances must vote “yes” in order to enact measures into law, has provided that reorganization proposals shall become effective if one branch refuses to say “no.” Both houses must say “no” in order to “veto” reorganization. Where did this device originate? How has it worked? Can it be used for other subjects of legislation?

I

PRESIDENT HOOVER had seen that the Congress was either unable or unwilling to decide upon needed executive reorganization. In his message of December 3, 1929, he cited the failure of congressional efforts over a period of two decades and requested that the power to act be conferred upon him “with the reservation of power of revision by Congress.” But what measure of power should Congress retain and how should it exercise it? Over this there was a continuous and sometimes acrimonious difference of opinion.

In the Overman Act,¹ passed on May 20, 1918, Congress had given President Wilson rather complete authority to redistribute agencies whose activities were important in connection with the prosecution of the war. It gave this authority without strings. Mr. Wilson was simply to “report” the actions which he took. They were neither numerous

nor spectacular although the statute was of considerable significance in enabling the President to give sufficient authority to some of the emergency agencies. To President Hoover, Congress was unwilling to give such a blank check. It ignored his message of 1929 until the Economy Act of June 30, 1932, which, in transferring the initiative to the President, provided that executive orders regrouping and consolidating agencies were to lie before Congress while it was in session for sixty days before becoming effective. Within that time either house of Congress might by resolution disapprove of the orders in whole or in part. A Democratic House of Representatives said “no” and thus Congress disapproved all of President Hoover’s executive orders—eleven in number.

On the eve of his inaugural President Roosevelt received authority within a broader scope to reorganize federal administration. The Economy Act of March 3, 1933, provided that executive orders should lie before Congress while it was in session for sixty days and did not specify any method of voicing disapproval. Presumably, a joint resolution by both houses of Congress would have been necessary in order to disapprove an executive order; and the joint resolution would have had to go to the President for his signature. If (the contingency was remote) the President had vetoed a resolution disapproving his executive order, a two-thirds vote of each house would have been necessary to make congressional opinion effective. Hardly more than a fortnight later, the Economy Act of March 20, 1933 (the titles now strike a melancholy note) eliminated the provision that executive orders had to lie before Congress for sixty days *while Congress was in session*. President Roosevelt submitted his most important changes under this authority on June 10, 1933, just six days before Congress adjourned. Sixty days later the executive order became effective. There were later executive orders, but all dealt with minor matters.

¹Cf. the text and some discussion in W. F. Willoughby, *Government Organization in War Time and After* (D. Appleton and Co., 1919), p. 6.

The grant of power to the President was for a two-year period only. From 1935 on he could not act. In January, 1937, his Committee on Administrative Management proposed that power again be conferred upon the President to reorganize agencies. Bills introduced into the Senate and House of Representatives provided that executive orders accomplishing reorganization were to lie before Congress while it was in session for sixty days, within which time Congress might express disapproval by joint resolution. But the spectacular congressional battle over the President's recommendation that the membership of the Supreme Court be enlarged sidetracked consideration of administrative reorganization.¹

When a comprehensive reorganization bill was brought up in 1938, a new atmosphere of distrust and hostility toward the President was evident. Passed in the Senate by a narrow margin, the bill encountered strong opposition in the House of Representatives. In an effort to stave off defeat there were last minute concessions limiting the power of the President. Thus House leaders accepted the Kniffin amendment, which substituted procedure by concurrent resolution as the means for expressing congressional disapproval of executive reorganization. Nonetheless, the bill was recommitted by the House on April 8, 1938, by a vote of 204 to 196.

A considerably modified reorganization bill introduced into the House of Representatives on February 23, 1939, still proposed to give the President authority to determine (save for exempted agencies) the details of administrative changes. These changes were to be set forth in *plans* which before becoming effective were to lie before Congress while it was in session for sixty days. Within that period Congress might express its disapproval of a reorganization plan by concurrent resolution. The author-

ity conferred upon the President was to expire in January, 1941. This time with only minor changes the bill became law. In effect Congress gave power to the President which it had refused to confer a year before, but it retained checks which were more extensive than those of the 1933 acts.

II

WHILE it is true that the act of April 3, 1939, followed the pattern of its predecessors, it embodied features which were new to reorganization history and which, as has been said, marked important legislative innovations. The new features were four in number: presidential reorganization proposals were to be embodied in *plans*, not *executive orders*; these plans might be disapproved by Congress by concurrent resolution; the rules of procedure for legislative consideration of the plans were included in the law; and the plans as submitted could be disapproved only in their entirety.

The designation of the form in which the President was to submit reorganization details to Congress was changed principally to suggest that the President was to act not in an executive capacity but as a legislative instrument. On the floor of the House of Representatives Mr. Cox of Georgia explained the matter thus:

Everyone frankly concedes that executive departments of the Government should be reorganized. Congress would probably undertake the task had it facilities for working out essential details. Here draft is made upon the services of the official who is in the best position to serve congressional needs. The President is designated as the agent to do the work, and heretofore there has been no serious objection to his being entrusted with the duties created by the bill. We must use his services if we are to get desired results. This is an intelligent approach to the solution of the problem.²

The concept that the President would act as an agent of Congress was intended in part to meet the charge that the legislature was surrendering its power to the Chief Executive, but the answer was one of shadow

¹Cf. Joseph P. Harris, "The Progress of Administrative Reorganization in the 75th Congress," 31 *American Political Science Review* 862 (1937).

²84 *Congressional Record* 2375 (1939).

rather than substance. Moreover, the new terminology was intended to quiet the constitutional doubt whether Congress could by a process other than a formal act of legislation nullify action of the President. Some lawyers have maintained that an executive order stands or falls as an expression of inherent executive authority and that Congress cannot constitutionally reserve the power to disapprove it. Such a point of view, for example, was expressed by Attorney General William D. Mitchell in an opinion concerning the Economy Act of 1932.

It must be assumed that the functions of the President under this act were executive in their nature or they could not have been constitutionally conferred upon him, and so there was set up a method by which one house of Congress might disapprove Executive action. No one would question the power of Congress to provide for delay in the execution of such an administrative order, or its power to withdraw the authority to make the order, provided the withdrawal takes the form of legislation. The attempt to give to either House of Congress, by action which is not legislation, power to disapprove administrative acts, raises a grave question as to the validity of the entire provision of the Act of June 30, 1932, for Executive reorganization of governmental functions.¹

If, constitutionally, Congress could not disapprove reorganization proposals when embodied in executive orders, then perhaps it might properly reserve the power to disapprove *plans*. The issue of constitutionality versus unconstitutionality has in the past been determined by differences no more substantial than mere phraseology.

A second important feature of the act was the provision that Congress might disapprove of a presidential plan of reorganization by concurrent resolution. Article I, section 7, clause 3 of the Constitution of the United States stipulates that "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall

be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

As a matter of practice Congress has resorted to the device of passing concurrent resolutions which are not sent to the President for his approval, but as was pointed out in the House of Representatives "concurrent resolutions concern only intracongressional functions and do not have the effect of law." In 1896 the Senate Committee on the Judiciary was asked to express an opinion on the use of concurrent and joint resolutions, and in a report dated January 27, 1897, the committee stated:

We conclude this branch of the subject by deciding the general question submitted to us, to wit, "whether concurrent resolutions are required to be submitted to the President of the United States," must depend not upon their mere form but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do, they must be presented for his approval; otherwise they need not be. In other words, we hold that the clause in the Constitution which declares that every order, resolution, or vote must be presented to the President, to "which the concurrence of the Senate and House of Representatives may be necessary," refers to the necessity occasioned by the requirement of the other provisions of the Constitution, whereby every exercise of "legislative powers" involves the concurrence of the two Houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the President. In brief, the nature or substance of the resolution, and not its form, controls the question of its disposition.²

Admittedly, a concurrent resolution could not embody legislation and was without the force of law. Could such a resolution be used to disapprove presidential reorganization? President Roosevelt in 1938 had expressed the opinion that it could not. The reorganization bill of that year as it passed the Senate had authorized the President to submit to Congress reorganization proposals in the form of executive orders which

¹37 Op. Atty. Gen. 63-64.

²Quoted in 84 *Congressional Record* 2478 (1939).

were subject to disapproval by joint resolution. President Roosevelt defended this provision in his famous statement of March 31 disclaiming any dictatorial inclinations or qualifications by explaining that a concurrent resolution was "only an expression of congressional sentiment. Such a resolution cannot repeal executive action taken in pursuance of a law."¹

There was obviously a practical reason why Congress preferred to disapprove executive reorganization by concurrent rather than joint resolution. Since the latter was subject to presidential veto, a two-thirds vote in both houses might be necessary in order to make congressional disapproval of reorganization effective. It did not matter that President Roosevelt had said in 1938, "I would, in the overwhelming majority of cases, go along with carefully considered congressional opinion," a half promise not to use his veto power. There was still the possibility of veto in those few cases where the President might not agree with Congress.

The proponents of the 1939 legislation were determined that a simple majority of both houses should be able to disapprove the reorganization proposed by the President. No one even suggested that the President's 1938 statement about the ineffectiveness of a concurrent resolution was no longer applicable, since he had then spoken of congressional disapproval of executive orders and not of reorganization plans. The constitutional doubt was disregarded in order to accomplish a simple, definite objective.

Senator Wheeler, however, proposed an amendment to the 1939 bill providing that a presidential plan of reorganization should not become effective unless *approved* by a joint resolution, which was to be voted upon ten days after it was introduced, without reference to a committee, without being subject to amendment, and without a motion to reconsider being in order. The

Wheeler amendment was adopted by the Senate on March 21 by a vote of 46 to 43. But a motion to table a motion to reconsider was lost, 44 to 44, and after further parliamentary maneuvering on the next day the amendment was eliminated.

The Wheeler amendment was unacceptable to the determined advocates of reorganization for two reasons, one tactical and the other psychological. The bill as it became law made the President's reorganization plans subject to *disapproval* by concurrent resolution of both houses of Congress. The Wheeler amendment would have required a vote of *approval* of the President's plans by joint resolution. In either event a simple majority in both houses could defeat the proposed reorganization. The essential difference between the procedure adopted and that advocated by Senator Wheeler lay in the fact that in the event of an attempted vote of *disapproval* by concurrent resolution a disagreement between the House and the Senate made the reorganization plans of the President *effective*. Under the Wheeler amendment a disagreement between the two houses would have meant that the President's plans were *ineffective*. As the bill became law, a majority of one house could make the plan effective. Under the Wheeler amendment a majority of *both* houses was necessary.

This aspect of the procedure excited some comment in both the House and the Senate. The objection was succinctly stated by Senator Bone when he remarked, "I should like to ask the Senator if this proposal, so far as he knows, is the only departure from the traditional parliamentary procedure, which requires the assent of both Houses of Congress before any principle becomes embalmed in law. This is the first time I have ever heard of a bill becoming law without the assent of both Houses of Congress."

To this challenge Senator Byrnes replied by reversing the proposition. "No one House," he declared, "should have the right [to prevent a reorganization plan from becoming effective]. Congress speaks not by

¹Cf. Lindsay Rogers, "Reorganization: Post Mortem Notes," 53 *Political Science Quarterly* 161 (1938). These notes might well have been entitled "Ante Natal" (LR).

one House but by concurring action of both Houses." He likened disapproval of a reorganization plan to a bill or resolution repealing an existing law, which needed the positive action of both houses. While this argument was certainly ingenious, it did not indicate the real point of contention, which was the extent to which it was desirable to strengthen the authority delegated to the President. The result of the procedure actually adopted, as was later to be demonstrated, was to improve the possibility that the President's plans would become effective.

The other defect of the Wheeler amendment, psychological in character, cannot be conclusively demonstrated. Congressmen, however, are perhaps influenced by the nature of the opinion that they are called upon to express. Members who might hesitate or even refuse to cast a positive vote of *approval* of a reorganization plan submitted by the President, might on the other hand be willing to refrain from voting *disapproval* of the President's action. This difference conceivably could be crucial. A disinclination to vote affirmatively for a reorganization plan would prevent it from becoming effective. Under the procedure adopted a reluctance to express disapproval—even absence—might mean that reorganization would be accomplished.

A third unique feature of the Reorganization Act lay in the legislative rules which were written into it. If Congress was to retain the right to disapprove presidential plans by concurrent resolution, and that right was to amount to more than pious phraseology, then it was necessary to insure that both houses had an opportunity to express their opinion about a plan within the allotted sixty days. Tactics of delay or obstruction by the house leadership or by an individual senator would have the effect of preventing disapproval.

Accordingly, part 2 of title I of the act included legislative rules of procedure whereby both houses were to consider a concurrent resolution of disapproval intro-

duced by any member. In section 21 it was explained that the subsequent provisions were enacted as an exercise of the rule-making power enjoyed separately by both the Senate and House of Representatives. The next section provided the exact words in which a resolution of disapproval might be moved: "That the Congress does not favor the reorganization plan No. —, transmitted to Congress by the President on ———, 19—." Such a resolution was to be referred to committee, but if the committee did not report within ten days after the receipt of the resolution, an order to discharge the committee from further consideration would be in order. The discharge motion was made highly privileged and debate thereon was limited to one hour. After the committee reported or was discharged, a motion to consider the concurrent resolution was likewise made highly privileged and not debatable. Debate on the resolution itself was limited to ten hours, to be divided equally between those favoring and those opposed to the resolution. These rules of procedure applied to both the Senate and House of Representatives.

In the Senate Mr. Bailey remarked that the bill "provides for cloture contrary to all the rules the Senate has heretofore had respecting the imposing of cloture. It is cloture by majority vote. I do not know that we ever did such a thing before. Is that not a great offense against the precedents of the Senate, I ask the Senator from South Carolina?" Mr. Bailey was not answered. The rules embodied in the law did provide for cloture in the Senate, since debate on a resolution of disapproval was limited to ten hours. But the purpose of the cloture in this instance met with no opposition. Without such a limitation on debate a minority might have prevented a majority hostile to the President's plan from voting its disapproval. No senator cared to defend the desirability of such a situation, regardless of precedents. Hence disapproval by a Senate majority could not be delayed by a filibustering minority which favored a reorganization

plan coming from the President. This procedure is less cumbersome than that required to override a filibustering minority wishing to defeat legislation desired by the President or by Senate leaders.¹

Fourthly, by expressly providing the words in which a concurrent resolution of disapproval was to be moved, the act had the effect of requiring Congress to accept or reject a plan of the President *in toto*. Senator Byrnes explained that a resolution disapproving parts of a reorganization plan might be moved in either house, but that such a resolution would not have the privileged status accorded a resolution moved in the exact words of the act. Only a resolution moving that a reorganization plan be disapproved in its entirety was assured of coming to a vote in both houses within the sixty-day time limit.

III

IN THE period from April, 1939, to December, 1940, the President submitted five reorganization plans to Congress. All became effective, although under various circumstances. Reorganization Plan No. I, which, *inter alia*, set up three new major groupings of activities (the Federal Security Agency, the Federal Works Agency, and the Federal Loan Agency), was sent to Congress on April 25, 1939. The next day Mr. Taber, the ranking Republican member of the House Select Committee on Reorganization, introduced a resolution of disapproval. A week later the chairman of the committee, Mr. Cochran, announced that the Taber

¹Under Rule XXII of the Senate sixteen members may take steps to initiate cloture by signing a motion to bring debate to a close. The question must then be put one hour after the Senate meets on the following calendar day but one. If the motion to close debate is carried by two-thirds of those voting on it, the measure before the Senate becomes unfinished business to the exclusion of all other matters. No senator thereafter is entitled to speak for more than one hour, and except by unanimous consent no amendment is in order unless presented before the motion to close debate was adopted. No dilatory motions are in order.

Obviously debate could still proceed for a maximum of ninety-six hours, even if a two-thirds vote in favor of limiting debate was obtained. By way of contrast, Senate limitation on debate in reorganization matters is real limitation.

resolution would be reported and called up for consideration on the following day. The debate in the House on May 3 revealed that opposition to the reorganization plan was essentially partisan and not widespread. The careful calculation of details so as not to arouse legislative hostility had been successful. After only a short debate using less than half the ten hours allotted by the law, the resolution of disapproval was defeated by a vote of 265 to 128. The action of the House made consideration of the plan by the Senate unnecessary.²

On May 9, 1939, President Roosevelt sent Reorganization Plan No. II to Congress. The plan shuffled a number of activities and offices from one agency to another. This time no resolution of disapproval was immediately presented to the House. Instead, Mr. Byrnes, a friend of the plan, introduced in the Senate a resolution of disapproval and had it reported adversely by the Senate Select Committee on Government Organization, of which he was chairman. The resolution was defeated in the Senate on May 12 without debate and without a record vote. Thus it was guaranteed that Plan No. II would become effective.

Nevertheless, on May 16 Senator Byrnes introduced a joint resolution providing that Reorganization Plans No. I and No. II should go into effect on July 1, 1939. In presenting the resolution to the Senate three days later he explained that the purpose was one purely of bookkeeping convenience. The resolution would retard by one week the effective date of Reorganization Plan No. I and advance by one week the effective date of Reorganization Plan No. II. By making the effective date July 1, 1939, the accounts for the new organization structure could be set up on the first day of a new fiscal

²The provisions of Reorganization Plan No. I insofar as they affected the Executive Office of the President were supplemented by Executive Order No. 8248 on September 8, 1939. The incident suggested the possibility that executive orders might be used to fill in details of reorganization plans, but it is not conclusive because the arrangement of activities in the President's immediate office is peculiarly his own province, and Congress has usually been quite willing to leave the matter entirely to presidential discretion.

year. The Senate and the House both passed the resolution without debate and it was sent to the President for his signature. Although nothing was said about the matter at the time, in passing the joint resolution both houses of Congress gave affirmative approval to the first two reorganization plans. This factor might be important if perchance at some later time the procedure whereby Congress retained the right to disapprove plans by concurrent resolution should be attacked in the courts.¹

President Roosevelt sent Reorganization Plan No. III to Congress on April 2, 1940, and followed it with Plan No. IV on April 11. Of the proposed shifts of activities among several agencies, the one affecting the Civil Aeronautics Authority excited particular attention. The C.A.A. was one of the few so-called "independent" agencies not exempt from the President's power to reorganize. Plan No. III, in part, transferred from the Authority to the Administrator of Civil Aeronautics, an official responsible to the President, certain activities which he already exercised at the Authority's instance. Plan No. IV was more far reaching. A separate three-man Air Safety Board responsible for investigation of air accidents was abolished and its functions transferred to the Civil Aeronautics Authority, thereafter to be called the Civil Aeronautics Board. Both the Administrator and the new Board were transferred to the Department of Commerce, but it was specifically stated that the Civil Aeronautics Board was to exercise its rule-making, adjudicative, and investigative powers independently of the Secretary of Commerce.

Senator McCarran of Nevada, sponsor in the Senate of the Civil Aeronautics Act of 1938 which had created the Authority, Administrator, and Air Safety Board, promptly

¹See *Isbrandtsen-Moller Company, Inc. v. United States*, 300 U.S. 139 (1936) and *Swayne-Hoyt v. United States*, 300 U.S. 297 (1936). The Supreme Court refused to consider the constitutionality of the reorganization procedure of 1933 upon the ground that by subsequent appropriations, as well as by the Merchant Marine Act of 1936, Congress had given its approval to the changes made by the President.

introduced resolutions to disapprove both Plans No. III and No. IV. In the House, Representative Lea of California, co-sponsor with Mr. McCarran of the 1938 legislation, submitted on April 24 a resolution to disapprove Reorganization Plan No. IV. In the meantime a number of groups, including the American Federation of Labor, became vocal in their opposition to the transfer of the C.A.A. and the abolition of the Air Safety Board. In the van of the fight was the Air Line Pilots Association. It was argued that the move would sabotage the excellent air safety standards that had been achieved and that Department of Commerce "politics" would interfere with the Authority's functioning. Newspapers generally throughout the country also attacked Plan No. IV. On the other hand, the President vigorously defended the plan in a press conference and denounced the "flood of misinformation" about its purpose.

In neither house of Congress were the resolutions of disapproval reported from committee within the ten-day limit provided in the Reorganization Act of 1939. The absence from Washington first of Senator McCarran and then of Senator Byrnes delayed Senate action, and in the meantime House leaders were disposed to await the Senate's decision. Finally, it was agreed by congressional leaders that the House would consider a resolution of disapproval first. On May 7, 1940, Representative Lea moved the House Select Committee on Reorganization be discharged from further consideration of his resolution expressing disapproval of Reorganization Plan No. IV. Mr. Cochran, the committee chairman, was agreeable; he had thus avoided an expression of committee opinion on the plan. By unanimous consent debate on the resolution was limited to three hours. The next day the House by a vote of 232 to 153 expressed its disapproval of Plan No. IV.

On May 9 the Senate Select Committee on Government Organization began public hearings upon Senator McCarran's resolution to disapprove Plan No. IV. With the

promise of prompt action Mr. McCarran agreed to await the committee's report and did not carry out his threat to move the committee's discharge. The reorganization plan was defended before the committee by the Director of the Budget and attacked by two members of the Air Safety Board. The chairman of the C.A.A. and the Administrator were on the whole noncommittal. The hearings revealed something of the clash of personalities which had occurred within the Air Safety Board as well as the duplication of activity between the Board and the Authority. At the end of the second day of hearings, the Senate committee by a vote of 5 to 3 adopted an unfavorable report upon the resolution of disapproval.

When the Senate began consideration of the McCarran resolution on May 13, 1940, Senator Barkley, the majority floor leader, pointed out that ten hours was the maximum time permitted for discussion. This, for the Senate, was a unique experience. Save under the Reorganization Act, such cloture would be possible only by unanimous consent. A proposal to set an hour on the next day for a vote on the resolution met objection, but later by unanimous consent the Senate agreed to limit the debate to eight hours and then, still later, to vote at four o'clock on the next afternoon.

There is one further aspect of the Senate procedure which warrants mention. The Reorganization Act of 1939 provided that the time for debate in each house should be divided equally between proponents and opponents of a resolution disapproving a reorganization plan. Unlike the House of Representatives, the Senate is not accustomed to designating a single member on each side of a question as the controller of time for debate. Two different efforts by Senator Barkley to obtain unanimous consent that Senator McCarran control the time of opponents were unsuccessful. Each speaker was asked at the beginning to state which side he favored, but there was no formal way of limiting the duration of his remarks. Actually, there was an unofficial

understanding among the senators participating in the debate about how long each was to speak.

According to the provisions of section 27 (b) of the Reorganization Act, the concurrent resolution already passed by the House was automatically substituted for the McCarran resolution of disapproval when the roll was called. By a vote of 46 to 34 the Senate rejected the House resolution of disapproval. Since the Senate and House disagreed about the desirability of Reorganization Plan No. IV, the plan was to become effective sixty days after its submission to Congress.

Unquestionably the course of events abroad had much to do with the final vote in the Senate on Plan No. IV. Indeed it is likely that had a vote in both houses of Congress been taken within two weeks after its submission, the plan would have been disapproved. But on May 10, 1940, the armed forces of Germany invaded Holland and Belgium. The immediate Nazi successes shocked the American people, and public opinion began to rally behind the leadership of the President. At the same time came the realization that these events made it probable that Mr. Roosevelt would be a presidential candidate for a third term. Whatever may have been the theory of agency embodied in the Reorganization Act, the prestige of the President was directly involved when the vote on Plan No. IV was taken. A majority of the Senate swung behind the leadership of the President in the mounting crisis over the nation's own security. After the failure of the Senate to disapprove Reorganization Plan No. IV no efforts were made to demand a vote on Reorganization Plan No. III. In consequence, that plan became effective without either house considering a resolution to disapprove it.

On May 22, 1940, President Roosevelt submitted Reorganization Plan No. V to Congress, providing solely for the transfer of the Immigration and Naturalization Service from the Department of Labor to the

Department of Justice. The move, the President explained, was made desirable by the wish to bring about "more effective control over aliens." It was a step to combat possible "fifth columns" in the United States. Because it then seemed unlikely that Congress would be in session sixty calendar days after the plan's submission as required by the act in order for it to become effective, the President expressed the hope that Congress would take the necessary action to "permit this plan to go into effect."

After a short debate and without a record vote, the House of Representatives on May 27 approved a joint resolution making Reorganization Plan No. V effective ten days after enactment of the resolution. In the Senate on May 31 Mr. Byrnes brought up the House resolution and proposed a committee amendment providing that Reorganization Plans Nos. III and IV should go into effect on June 30, 1940. He explained that under the provisions of the Reorganization Act, Plan No. III would become effective on June 2 and Plan No. IV on June 11. Reasons of bookkeeping convenience made it desirable to postpone the effective date until the end of the fiscal year. The amendment was unanimously accepted without debate. After a short debate on Reorganization Plan No. V, the Senate passed the joint resolution by a vote of 55 to 4, the House quickly concurred in the amendment, and the measure was sent to the President for his signature.

IV

WHAT is the importance of the legislative procedure used to accomplish administrative reorganization? It lies in the fact that Congress admitted that on this important matter the President should have his way unless congressional opinion was definitely negative—that is, if the President was unable to carry with him at least a majority of one house. Under our scheme of government—rather, under our practice—the basic framework of administrative structure has depended upon the action of Congress. The

President has only such power over administrative organization as Congress by law confers upon him. Efforts in the past amply demonstrated that Congress could not reorganize activities, because as soon as the "pet" agency of a committee or an individual congressman was touched, it or he became hostile to all proposals of change in order to save a particular charge. Congress could agree upon the desirability of reorganization in theory, but not upon the specific details.

Hence in the United States the President has been under handicaps which did not face the chief executives of other states which maintained free institutions. A British cabinet has always been able to obtain any kind of administrative reshuffling which it desired. Much can be done by Treasury Minutes. If legislation is necessary, the Government announces its intention, confident that Parliament will approve. Indeed the complaint in Great Britain recently has been that the cabinet was perhaps fatally laggard in proposing a Ministry of Supply with real powers and in the coordination of departments dealing with economic activities. In France, despite the usual subservience of cabinets to the Chamber of Deputies, prime ministers always had a free hand in determining the number of players they would have on their ministerial teams.

The President of the United States can obtain full and continuing authority over administrative organizations only by act of Congress. Except for emergency activities, Congress has had no inclination to transfer such power. The necessary delegation of legislative authority would be unpalatable to many members of Congress and to many local elements of the body politic. The Reorganization Act of 1939 points a way out of this specific impasse. Within certain limits upon agencies and time, the President was given power to reorganize the administrative arm of the government. Congress determined the broad policy—that executive agencies be regrouped and consolidated according to major purpose—but left the de-

tails to the President. There was no basic disagreement about the need for reorganization: Congress simply could not agree upon the specific changes which were desirable. This decision was accordingly left to an agent, the President, whose determination was made subject to legislative veto. If in other instances outright delegation of legislative power to some agent seems undesirable, why cannot a similar procedure be used?

V

IN England grants of power in certain matters have long been conferred upon local authorities by a procedure similar to that we are discussing. After investigation a government department may make a provisional order permitting a local authority to perform or not perform a certain act. These provisional orders are later introduced into Parliament in an omnibus bill. If there is any opposition to a particular grant of power, Parliament has an opportunity to defeat it and thus revoke the provisional order.¹

In at least two notable instances Parliament has resorted to the same kind of procedure in dealing with matters of national interest. By the Church of England Assembly (Powers) Act of 1919, the Church of England Assembly was empowered to frame any legislation it thought desirable concerning the Church of England. A specific measure, however, does not become effective until it has been approved by both houses of Parliament, and Parliament must accept or reject the measure *in toto*. Again, in 1934, the Unemployment Assistance Act empowered the Unemployment Assistance Board with the approval of the Minister of Labour to frame scales of allowances for the relief of the unemployed. While these scales do not become effective until approved by both houses of Parliament, they can be accepted or rejected only as a whole. In neither instance can Parliament directly modify or

¹But Parliament rarely does so. See W. Ivor Jennings, *Parliament* (Cambridge: at the University Press, 1940), pp. 458 ff.

amend the proposals submitted to it.²

If certain details of any plan are objectionable, a legislature can disapprove all of it. Then the executive or other agency which framed the plan can modify the objectionable details and submit it again. Or a legislature can accept the program with the expectation of changing the undesirable parts by later substantive legislation. Here is an adequate guarantee that the legislature's point of view will be considered when it delegates authority to another branch of the government or to a specially constituted agency.

VI

IN THE United States, Congress has occasionally freed itself of troublesome problems by devices not unlike that of the reorganization acts of 1933. After nine years of disagreement about the reapportionment of seats in the House of Representatives following the census of 1920, Congress by act of June 18, 1929, provided that after completion of the 1930 census and every census thereafter the President should transmit to Congress a statement showing the number of seats each state was entitled to under an apportionment of the existing 435 seats according to each of three specified formulas. If Congress failed to pass an apportionment bill, then each state was automatically to be entitled to the number of representatives under the formula used in the last apportionment. The 1930 reapportionment of seats was accomplished under the automatic provision.³

²Cf. John D. Millett, *The British Unemployment Assistance Board* (McGraw-Hill Book Co., 1940).

³The 1929 law provided that the President should transmit his statement on apportionment to the second regular session of the 71st Congress (which would meet in December, 1930) and to the second regular session of every fifth Congress thereafter. In 1939 President Roosevelt called attention to the fact that as a result of the adoption of the twentieth amendment the second regular session of the 76th Congress would meet in January, 1940, three months before the census count would be taken, and that hence he would be unable to transmit an apportionment statement to that session of Congress. In 1940 Congress passed a bill providing that the apportionment statement should be submitted to the first regular session of the 77th Congress (meeting in January, 1941), and to the first regular session of every fifth Congress thereafter. Public No. 482, 76th Congress, 3d Session.

In 1934 an important measure was passed which caused no exacerbation of legislative, executive, or for that matter judicial feelings, and attracted no fanfare of public interest. Few save lawyers know about it. While the Supreme Court of the United States had power to frame the rules of procedure for cases in equity coming before the district courts, it had no such authority to frame rules governing actions in law. The Conformity Act of 1872 provided that each federal district court should follow the code of procedure for actions in law which was in force in the state in which the district court was located. From 1912 on the American Bar Association and other groups made continued efforts to induce Congress to confer upon the Supreme Court the power to frame uniform rules for equity cases and cases in law.

Upon the recommendation of Attorney General Cummings, Congress, by act of June 19, 1934, authorized the Supreme Court to prescribe uniform rules for both cases in equity and actions in law, so that one form of civil procedure would prevail in all the district courts of the United States. This delegation of power was accompanied by the restraint that "such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

To do the actual work of preparing the uniform rules the Supreme Court appointed an advisory committee headed by former Attorney General William D. Mitchell. The result of three years of study and negotiation was transmitted by the Chief Justice of the United States to the Attorney General on December 20, 1937, and submitted in turn by him to both houses of Congress on January 5, 1938. Hearings before the House Committee on the Judiciary resulted in a slight change in the rules to meet the fears of counsel for organized labor. The changes were made by the advisory committee after direct consultation with labor counsel as re-

quested by the House committee. Thereafter, the House committee recommended that the rules be permitted to become effective.¹ The absence of any further action by either house served this purpose.

No particular comment was made in the hearings or elsewhere about the procedure used in framing the uniform rules. The delegation of such authority to the Supreme Court was not questioned as a "surrender" of legislative power to the judiciary. Leaders of the bar and of Congress accepted the desirability of leaving the details of the uniform rules to the Supreme Court. But by requiring that the rules be submitted to it before becoming effective, Congress kept for itself the power of review.

In 1940 the same procedure was embodied in a law directing the Supreme Court to prescribe rules of pleading, practice, and procedure for criminal cases before federal district courts. The concluding limitation provided that "such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect." These final words, making clear that the Supreme Court has been given authority to modify as it sees fit any existing laws on criminal procedure, confirm the broad delegation of power granted by the act, but as in the instance of the rules of civil procedure, the opportunity is afforded for legislative veto of the rules drafted by the Court. A joint resolution of disapproval might be passed at any time during the session at which the rules are submitted.

VII

IN MORE and more fields where Congress cannot, or should not, determine details, it may be desirable to retain the possibility of legislative veto when delegating power to either the executive or the judiciary. Then

¹ House of Representatives Report No. 2743, 75th Congress, 3d Session, June 13, 1938.

fears about the consequences of "unlimited delegation" may be allayed. Indeed, it is fairly safe to say that whenever Congress decides that the federal budget should be balanced by curtailing expenditures, for both reasons of administration and of politics, the details will have to be left to the executive. So much has been admitted by Senator Byrd, an implacable critic of President Roosevelt, who told the Senate in 1939:

It is an obvious fact that substantial retrenchment can best come by Executive leadership. Congress must act upon the Budget as submitted by the President. The Budget is coordinated and inclusive of all governmental functions. Economy and retrenchment effected in the Budget stand a much better opportunity of passage by Congress as a proper and careful preparation of the Budget can balance any economies made so as to create a minimum of disturbance.¹

If the legislature wishes to insure that it will have an opportunity to express an opinion upon the exercise of discretion by those who fill in the details of a legislative mandate, then the legislature ought to include in the original law some reservation similar to that of the Reorganization Act of 1939. It is not enough merely to provide that the scheme of details be laid

¹84 *Congressional Record* 2907.

before Congress; the obstructionist tactics of a minority might then be able to block an expression of congressional opinion. Moreover, if the legislature provides that executive proposals shall be subject to disapproval by concurrent resolution rather than to approval by joint resolution, it will increase the possibility that the action of the executive will become effective, and will at the same time enable the rejection of proposals that are ill advised. Thus would be realized a "nicer balance" between legislature and executive, which at the outset we suggested was the philosopher's stone for which to search. Under our form of government the instruments available to the executive for providing legislative leadership are meager and faulty enough; a "nicer balance" can be attained only by strengthening the executive's position.

Nor is there any reason to open the way for legislative modification of parts of an executive plan. The proposal as a whole should be voted on: is it acceptable or unacceptable? To permit amendment would be to nullify the very purpose of the entire procedure—to remove the details of controversial subjects from the arena of legislative bickering and indecision.